A Japanese approach to international law

Territorial disputes and investment dispute settlements

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In Japan, only a few academic scholars are aware of the plurality of academic scholarly perspectives. Most others do not think that their methods are different from the Western methods. This phenomenon is visible in international law study too. Such an attitude is not groundless. Japanese international law scholars are more internationalized than domestic law scholars. Most of them understand two or three European languages well, have experience of studying at Western universities, and regularly participate in academic discussion with Western scholars at conferences. It follows from them that a certain degree of intersubjective comprehensibility has already been achieved between Western and Japanese scholars. As a matter of course, this does not mean that Japanese scholarly methods exactly correspond to Western methods. We can detect some specific features of a Japanese approach to international law.

Distinguishing Traits of a Japanese Approach to International Law

The contrast between the Occidental and the Oriental civilization in terms of an academic approach often attracts people's attention. Johan Galtung summarizes the features of Japanese intellectual styles as 'weak in Paradigm-analysis', 'strong in Descriptions', 'weak in theory-formation' and so on. His analysis is useful to discover some features in a Japanese approach to international law.

The first one is 'less interest in theory formation and paradigm analysis'. All recent theories such as 'global constitutionalism' are originated in the West. Japanese scholars always discuss international law problems within the framework or paradigm set by Western scholars, and their interest in developing their own theory or paradigm is weak. The second is 'more interest in positive analysis'. Instead of less enthusiasm for theory formation, Japanese scholars put a heavy weight upon positive analysis of international law. Roughly speaking, European scholars compete with each other in originality of their ideas, while Japanese scholars compete with each other in details of their analyses. The third is 'little interest in inter-disciplinary approach'. As a result of such a feature, most of their analyses are confined to purely legal analysis. To begin with, Japanese scholars are not capable of doing interdisciplinary analyses, because they have not received academic training other than law. The fourth is 'inactivity of Japanese scholars in international settings'. In Japan, there is a large academic community of international law with more than one thousand scholars, but they are not visible outside Japan. As most of their works are still written only in Japanese, it is difficult for non-Japanese scholars to know what

they discussed. From the next section, two real cases will be examined in order to more clarify Japanese scholarly approaches and perspectives.

Territorial Dispute in the East China sea

The first case study picks up a dispute between China and Japan about the possession of the Senkaku/Diaoyu Islands (five uninhabited islets and three barren rocks with the total of 7 square kilometers), located in the center of the East China Sea. These islands had not been subjected to any administrative control by either China or Japan. This situation changed at the end of 19th century, when Japan annexed the islands in early 1895 during the Sino-Japan War. After the end of World War II, however, the Republic of China (Taiwan) government and the People's Republic of China government officially began to declare ownership of the Islands. The dispute emerged in the early 1970s and has continued to date. A high level of tension exists at the moment between China and Japan.

The issue to be discussed here is the influence of national interests on Japanese scholarship. While each scholar must be sensitive to his or her national bias in order to develop more universal scholarly approaches, any territorial dispute cannot but strengthen national viewpoints of legal scholars, because such a dispute always arouses exclusively nationalistic sentiments in any country.

Articles, presentations or books of Japanese international law scholars on the Senkaku/Diaoyu Islands are relatively few for the severity of the dispute, while no Japanese international law scholar officially supports the Chinese possession of the Islands. If Chinese legal arguments are extremely weak, it makes sense that everybody supports the Japanese government's view, but one cannot say that the Chinese government's claims are altogether groundless too. Therefore, there is some likelihood that the absence of Japanese scholarship espousing the Chinese claims demonstrates the existence of national bias which is immanent in Japanese scholars.

An issue on whether or not a territorial dispute exists

However, it should be kept in mind that Japanese scholars do not consent to all claims of the Japanese government. The point of difference is found about the existence of a territorial dispute. The notable feature of the Japanese government's claims is that the government does not recognize the existence of a dispute to be resolved. The Permanent Court of International Justice defined a dispute as 'a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons'. In the light of this established standards, it seems relatively easy to find out a dispute between China and Japan. Nonetheless some of international scholars in Japan express their support to the government. However, it is worth mentioning that unlike the issue on the possession of the Islands, not all of Japanese scholars follow the Japanese government. Based upon reasonable legal analysis, Yoshiro Matsui takes the view that one cannot deny the existence of a dispute concerning the Islands between China and Japan under current international law, because of both parties' clearly diverging legal arguments. He also suggests that Japan should enter into negotiation with China in order to bring the dispute

under control. His views demonstrate that even in the case of territorial disputes, Japanese international law scholarship is not wholly subject to national interest that is authorized by the government. Japanese scholars can partially enjoy academic freedom even in the most difficult situation.

Ad hoc Arbitration Tribunal or Permanent Investment Court

The second real case concerns a conflict on dispute settlement mechanisms for foreign investment disputes. This conflict is also ongoing in the negotiation between the EU and Japan. Japan opened negotiations on a free trade agreement with the EU in 2013. After intense negotiation, they finally reached the successful conclusion of the EU-Japan Economic Partnership Agreement (EPA) in July 2018. Even after completing the negotiation, however, one important subject still remains outside the agreed text. That is foreign direct investment. Negotiations continue on investment protection standards and investment dispute resolution. The major obstacle exists in how to design a dispute settlement mechanism for investment disputes, namely either an ad hoc arbitration tribunal for disputes between private investors and host states (the ISDS) proposed by Japan or a permanent investment court system (the ICS) offered by the EU. The EU had made regular use of the ISDS in the past, but the European Commission recently changed its attitude towards the ISDS. It seems that this gap between the two parties is not easy to be filled up.

Criticism on investment arbitration has been also intensified in recent times in the West. Due to these criticisms, the ISDS remains quite unstable, and thus many reform options are being discussed. However, there are substantial differences in term of these criticisms between European and Japanese scholarships.

In parallel with the exponential increase of investment arbitration cases, European scholars started expressing their critical views about the ISDS. Although not all of them joined a critical circle, a majority of them have considered investment arbitration as ‘an instigator of the democratic deficit’, and pointed out many problems inherent in the ISDS. The critical trend has continued to expand and it seems that uneasiness about the arbitration model is now widely shared by European scholars. Therefore, one can reasonably presume that the Commission’s idea on ICS has reflected such scholarly debates in Europe.

The different view of Japanese scholarship

In contrast, critical views about the ISDS are much less in the Asia and Pacific region. Most countries including Japan are more positive to or less cautious about the use of the ISDS. The stance of the Japanese government to the ISDS is consistent with an attitude of Japanese scholars. Unlike European scholars, Japanese scholars do not much criticize the ISDS. Even in Japan, substantial amount of scholarly works on the ISDS have been published in the last decade. However, most of them are analysis of case-law by examining arbitral awards, and do not include many critical elements to the ISDS, although some of them recognize the usefulness of the ICS to resolve many problems.

The issue to be examined here is to consider why Japanese scholars are less critical of the ISDS than European scholars. At least two assumptions can be presented to explain the emergence of such a gap. The first point of divergence is different understanding in values and international law between Europe and Japan. The main criticisms against the ISDS foremost rely upon commonly shared normative values in Europe. On the other hand, Japanese arguments are less normative-valued. We cannot find critical Japanese opinions about ISDS from the viewpoint of normative values such as the rule of law and democracy. The second point of divergence is actual experience of being claimed. It is likely that the fact that Japan has been never subject to a treaty-based claim before an arbitration tribunal has influenced views of the Japanese government and scholars. Empirical research confirms that the fact that a state is subjected to an initial ISDS claim made a considerable impact upon its attitude to ISDS. This means that if Japan becomes subject to investment arbitration in a future, it is likely that Japanese scholarship will suffer certain changes.

Final remarks: towards a more active scholarship

In order to build up universal intersubjective comprehensibility, we have to overcome epistemic nationalism or regionalism. For this purpose, we have to understand for a start that our own perspectives might be national or regional perspectives. On the other hand, we also have to recognize that many of our own perspectives have potential to grow up to be universal perspectives. The process of extracting universal elements from national or regional practices is necessary to construct universal intersubjectivity.

The Japanese Association of International Law started publishing its own legal journal in 1902. Its launching address admired that the participation of Japan in international law constituted a turning point of international law, because Japan's participation had transformed European and Christian international law into true international law for all countries. As the word of 'participation' indicates, Japan recognized an international law framework among European countries as given. But it is the time for Japanese scholars to change such an attitude, to build up new intersubjective comprehensibility and to actively create new scholarship.

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